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Problems in Transnational Acquisitions and Mergers

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*by Wilbur L. Fugate**

I. INTRODUCTION

THE DISCUSSION TODAY of the extraterritorial application of the United States antitrust laws and the Canadian response is extremely timely. The opposing points of view and efforts to reconcile jurisdictional questions are very much in the limelight today, as indicated by the cases and investigations involving uranium, and those involving potash. The June 1977 meeting between United States Attorney General Bell and Canadian Cabinet ministers on the subject of extraterritoriality in antitrust matters followed up by a meeting of American and Canadian antitrust officials in August 1977 indicates the importance which our two governments attach to the topic here being discussed.

These governmental meetings are a continuation or a new beginning of coordination between the respective antitrust authorities presently embodied in the Mitchell-Basford Antitrust Notification Agreement entered into in November 1969.[1] While I was with the United States Department of Justice, we worked very closely with the then Director of Investigation and Research under the Combines Act, now Judge D. H. W. Henry and the then Deputy Director, now the Chairman of the Restrictive Trade Practices Commission, Mr. J. J. Quinlan. Such coordination and mutual discussion is essential and I am glad to see the present activity along these lines. Presumably, discussions of any proposed antitrust action involving a United States-Canadian merger would take place between American and Canadian antitrust authorities under the existing understanding. This also would be required under the Antitrust Notification Resolution adopted by the Organization for Economic Cooperation and Development (OECD) in 1967.

II. ACQUISITIONS AND MERGERS

As Judge Henry pointed out in 1966 at a similar symposium on *Mergers and Joint Ventures as they Affect Canadian-United States Trade and Relations,*[2] "Canada is a relatively small economy having an industrial structure characterized by a relatively small number of firms in Canada, many of

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* Of Counsel, Baker, Hostetler, Frost & Towers, Washington, D.C.; former Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice; author of *Foreign Commerce and the Antitrust Laws* (2d ed. 1973); U.S. Delegate to OECD Restrictive Business Practices Comm., 1961-1973. This paper was delivered at the Canada-United States Law Institute's Antitrust Conference, held September 30, 1977, at the University of Western Ontario, London.

[1] For an explanation of this agreement, see U.S. Dep't of Justice, Joint Statement (press release, Nov. 3, 1969).

[2] For a collection of the papers presented at this 1966 A.B.A. Annual Meeting of the Section of Antitrust Law, see 32 A.B.A ANTITRUST L.J. 156-214 (1966).

which are subsidiaries of American parents."[3] He also emphasized that "[i]n a market the size of Canada, the impact of the large international firm can be relatively great and is likely to be more significant in any given industry than would be the case in the United States with its considerably larger markets and industrial structure."[4] Speaking again of multinational companies, he pointed out that a "decision made by a large international firm to change its competitive policy in the Canadian market or to refuse its Canadian subsidiary the right to penetrate export markets in which the parent is interested, can have a significant effect upon the state of competition in the Canadian economy."[5]

The realization of these facts prompted the enactment in 1973 of the Canadian Foreign Investment Review Act (FIRA).[6] This Act requires foreign companies to apply to the Foreign Investment Review Agency before acquiring control of a Canadian business or establishing a new business in Canada. The proposed new Canadian antitrust law, Bill C-42, would make the FIRA subordinate to the merger provisions of the new law.[7] The Bill would give the new Competition Board power to prevent or dissolve horizontal mergers covering more than twenty percent of the market. The Board, in considering such mergers must take into account a number of factors which it deems relevant, including the trend of concentration, size differential, degree of competition by imports, barriers to entry, extent of innovation in the market, likelihood of removing a vigorous competitor from the market, foreclosure of supplies or outlets, the possibility of a less restrictive entry into the market and, in favor of the merger, the likelihood that the merger will stimulate competition.[8]

The main thrust of the merger topic in the context of this Workshop's overall theme would appear, however, not to be the proposed Canadian merger law but the general rules as to the application of the United States merger laws to United States-foreign, particularly United States-Canadian, mergers and the extraterritorial effect of such application upon Canadian or other foreign interests. The United States antitrust statute primarily applied to acquisitions is section 7 of the Clayton Act,[9] and, to a limited extent, section 1 of the Sherman Act,[10] and section 5 of the Federal Trade Commission Act.[11] Section 7 provides, in part, that no corporation engaged in commerce shall acquire the whole or any part of the stock, and if subject to the jurisdiction of the Federal Trade Commission, the whole or any part of the assets, of

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[3] Henry, *Mergers and Joint Ventures as they Affect Canadian-United States Trade and Relations—A Look at the Canadian Antitrust Laws*, 32 A.B.A. ANTITRUST L.J. 156, 171 (1966).

[4] *Id.* at 171.

[5] *Id.*

[6] Foreign Investment Review Act (Bill C-132). For a text of this Act, see CURRENT LEGISLATIVE DIGEST-CANADA, 29th Parliament, 1st Sess. 13 (1973).

[7] Section 29, proposed new § 31.71(9)-(15).

[8] *Id.* § 31.71(4).

[9] 15 U.S.C. § 18 (1976).

[10] *Id.* §§ 1, 2.

[11] *Id.* § 45.

another corporation also "in commerce" where, "in any line of commerce in any section of the country, the effect . . . may be substantially to lessen competition or tend to create a monopoly."[12]

Antitrust acquisitions are usually treated as either horizontal, vertical or conglomerate. Horizontal acquisitions are those between direct competitors; vertical acquisitions are those flowing "backward" into a supplying market or "forward" into a purchasing market; and conglomerate acquisitions are those which are neither horizontal nor vertical.

The primary indicia testing the legality of acquisitions under United States merger laws are market share statistics. Market share statistics, however, are not always decisive and further examination of the market for such factors as market structure, barriers to entry and adverse economic effects are also taken into consideration in order to determine whether or not an acquisition will violate the law.[13]

The United States Supreme Court has recently held that since section 7 of the Clayton Act requires both the acquiring and the acquired company to be actually engaged in United States interstate or foreign commerce, the activities covered must be actually in, rather than merely affect, such commerce.[14] The Department of Justice is supporting legislation to reverse this case and to create the same test as that under the Sherman Act where the activity complained of must only have an effect, usually said to be a direct and substantial effect, upon United States commerce.[15]

In most transnational mergers and joint ventures the primary impact is in the country where the acquisition takes place, that is, where the acquired company is located. This is recognized in section 7 of the Clayton Act which requires an effect in a "section of the country," that is, a section of the United States. However, section 7 covers mergers regardless of whether the acquiring or acquired company is located in the United States if there is the required effect.

The United States courts in transnational merger cases have only looked at the United States market since, as noted, the test is an effect upon a "section of the country." This is also the thrust of the proposed Canadian merger law and is certainly that of the present FIRA. Given the limits of jurisdiction, sovereignty and apparent national interest, this is necessarily the case. It has been suggested, however, that the national market is not the correct unit to evaluate the effect of a transnational merger. Professor Richard E. Caves, in a paper delivered in Canada during the Spring of 1977, stated that:

> If a leading U.S. firm acquires a leading Canadian firm in its same industry, concentration measured in each of the national markets will initially be unchanged. However, it will rise in the two markets taken

[12] *Id.* § 18.

[13] *See* United States v. General Dynamics Corp., 415 U.S. 486 (1974), where the United States Supreme Court took into account factors other than market percentages.

[14] United States v. American Building Maintenance Industries, 422 U.S. 271 (1975).

[15] *See, e.g.,* United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd,* 341 U.S. 543 (1951).

together. Furthermore, if the U.S. firm was formerly exporting to Canada, the concentration of *all* sellers in the Canadian market will rise although the concentration of *Canadian* sellers stays as before.[16]

Professor Caves hoped that coordination among OECD countries might handle this problem. However, this is not likely in the absence of some common market concept such as exists in the European Communities.

When we look at the transnational cases decided by the American courts, those involving the acquisition by foreign companies of United States companies, there are involved very much the same considerations as exist in purely domestic mergers. The level of concentration in the American market and whether it is increasing is as large a factor as it is with domestic cases, and the test is a significant anticompetitive impact in the relevant United States market. If the foreign firm is already in the market, then the percentages of the market, particularly those set out in the Department of Justice Guidelines,[17] will be important although later Supreme Court cases have de-emphasized pure percentage evaluations. These Guidelines specify, for example, that in a highly concentrated market the Department will usually challenge horizontal mergers between firms accounting for as little as four percent each of a market. In a vertical merger, as an example, the Department will usually challenge a merger between a supplying firm accounting for ten percent or more of the sales in its market, and a purchasing firm, accounting for six percent or more of total purchases in that market "unless it clearly appears that there are no significant barriers to entry into the business of the purchasing firm."[18] There are no guidelines specifically for transnational mergers, but as will be noted, the guidelines for conglomerate mergers, emphasizing potential competition, may be the most applicable.

Apart from actual competition in the United States market, the major factor in either type of transnational merger is the potential competition doctrine. The primary idea here is that a merger may deprive a United States market of a potential new entrant who would furnish competition in a concentrated market by *de novo* or independent entry. The merger may be held illegal if one or both merger parties in a joint venture are on the edge of the market and furnish a restraining influence upon prices in the market, that is, by the threat of their entry prices would rise too high. Thus, a merger between a large foreign firm which is one of a few likely potential entrants and an American firm which is a "leading firm" in its market may come within section 7.

There are only a handful of United States cases involving international acquisitions. I will first discuss those in which a United States company has acquired a foreign firm. One involving a Canadian company was the *Schlitz*

[16] R.E. Caves, *Industrial Concentration, Corporate Size and Economic Power: The Unfinished Agenda,* speech before the National Conference on Competition Policy, held at the University of Toronto, on May 13, 1977 (emphasis added).

[17] U.S. Dep't of Justice, U.S. Dep't of Justice Merger Guidelines, *reprinted in* [1977] 1 TRADE REG. REP. (CCH) ¶ 4510.

[18] *Id.* ¶ 5.

case,[19] where the American company, Schlitz Brewing Co., acquired a large interest in the Canadian brewer, John Labatt, Ltd. While this acquisition was held illegal under section 7 of the Clayton Act primarily because it eliminated actual, direct competition in the domestic market between Schlitz and a United States subsidiary of Labatt, the court also mentioned the potential competition between Schlitz and Labatt itself. The court referred to the concentrated state of the beer market in the United States and stated that Canadian companies offered the greatest source of potential competition.[20]

In the *Gillette* case,[21] the Justice Department brought an action against the acquisition by the Gillette Co., the largest domestic producer and seller of safety razors and blades ("wet shaving" instruments), of Braun, A.G., the third largest manufacturer of electric razors ("dry shaving" instruments) in Europe. The complaint alleged that if the acquisition was permitted to stand, it would result in the elimination of Braun as a potential competitor in the United States market; Gillette's dominant position in the United States market would be enhanced; and mergers and acquisitions by other manufacturers of shaving instruments would be fostered. The complaint also charged that competition between Gillette and Ronson Corp., its domestic competitor, would be lessened in view of an exclusive patent licensing agreement, originally a distributorship agreement, between Braun and Ronson. The case was settled by a consent decree which required that Gillette create a new United States company which would be a "fully operative, viable, going business in the electric shaver market in the United States," and to cause the new company to make an entry into the United States electric shaver market. Gillette was directed to cause Braun to give an exclusive supply contract to the new company and to transfer to it all United States patents pertaining to electric shavers owned by Braun. Gillette was then directed to sell the new company within two years after making it a viable company.

A case filed by the Federal Trade Commission attacked the acquisition by Litton Industries of Triumph-Adler, a large German typewriter company.[22] Previous to this, Litton had acquired the second largest domestic typewriter company, Royal McBee Corp. The complaint alleged that Triumph-Adler was an actual as well as potential competitor in the United States market through its exports to the United States and distribution of its typewriters in the United States market. The Federal Trade Commission press release stated "in recent years the principal source of new entry has been foreign typewriter producers."[23] The Commission, reversing the administrative law judge, held that the acquisition was illegal and ordered divestiture.[24]

[19] United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd,* 385 U.S. 37 (1966), *rehearing denied,* 385 U.S. 1021 (1967).

[20] *Id.* at 147.

[21] United States v. Gillette Co., [1976] 1 TRADE CAS. (CCH) ¶ 60,691 (D. Mass. 1975) (consent decree).

[22] Litton Industries, Inc., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,267 (FTC 1973). *But see* W.R. Grace & Co., 71 F.T.C. 312 (1967).

[23] Federal Trade Commission (press release April 11, 1969).

[24] 82 F.T.C. 979, 1016 (1973).

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Subsequently, however, after reopening the case on the issue of damages, the Commission agreed with the administrative law judge that in view of the predominance of IBM and SCM in the typewriter industry, the divestiture order should be vacated.[25]

These cases have involved acquisitions of foreign companies by United States companies. It is the other type of case, in which a foreign company acquires a domestic company or an interest therein, or as in the *CIBA* case,[26] in which two foreign companies merged with effects on the United States market, which has caused the most reaction in foreign countries.

The *British Petroleum-Sohio* case,[27] for example, occasioned considerable criticism in the British press. The press took the position that since the United Kingdom had allowed giant United States companies to come into Britain, the United States should do the same with United Kingdom companies investing in the United States. The Department of Justice, however, indicated that the United States welcomed British Petroleum into the United States market through acquisition of the East Coast properties of Sinclair Oil Company. When, however, British Petroleum and Standard Oil Co. of Ohio (Sohio) proposed to merge, the Department indicated that it looked at the case exactly as it would have viewed a merger between two United States companies. Since Sohio had thirty percent of the Ohio market and British Petroleum, now operating on the East Coast, was a leading potential entrant into Ohio, this violated section 7 of the Clayton Act. This case was settled by consent decree providing for a divestiture of part of Sohio's holdings in Ohio.

A recent United States merger case concerned the acquisition by the British company, British Oxygen Company, of the American company, Airco, Inc.[28] The administrative law judge had held that the acquisition by British Oxygen, the largest producer of industrial gases in the world, of Airco, the third largest producer in the United States with about sixteen percent of the United States market, eliminated British Oxygen as a significant potential competitor on the edge of the market. The Court of Appeals for the Second Circuit, however, reversed the Commission, which also had held the acquisition illegal. The court referred to the FTC's finding that "as of December 1973, there was a 'reasonable probability' [that British Oxygen] would have eventually entered the U.S. industrial gases market by internal expansion, or its equivalent, but for the acquisition of Airco."[29] The court stated that the FTC was correct in using the "reasonable probability" test, quoting from *United States v. Marine Bancorporation, Inc.*[30] and *Brown*

[25] 85 F.T.C. 379, 380 (1975).

[26] United States v. CIBA Corp., [1970] TRADE CAS. (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree).

[27] United States v. Standard Oil Co., [1970] TRADE CAS. (CCH) ¶ 72,988 (N.D. Ohio 1970) (consent decree).

[28] British Oxygen Co., Ltd., [1973-76 Transfer Binder] 3 TRADE REG. REP. (CCH) ¶ 21,063 (FTC 1975), *rev'd*, [1977] 1 TRADE CAS. (CCH) ¶ 61,466 (2d Cir. 1977).

[29] BOC International, Ltd. v. FTC, 557 F.2d 24, 28 (2d Cir. 1977).

[30] United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

Shoe Co. v. United States,[31] in that "§ 7 deals in 'probabilities' not 'ephemeral possibilities.'" However, the court reversed on the basis of the FTC's statement that, "[s]imply because no entry had been effectuated at the time the Airco opportunity presented itself did not mean that [British Oxygen] would not have *eventually* realized its 'long-term objectives' of entering the U.S. market—by growth rather than by this major acquisition."[32] The court found that such an "eventual entry" test could not be the basis of a section 7 violation.

The court in the course of the opinion held inapplicable the "toehold acquisition" doctrine, that is, as applied to a foreign company, that a foreign company may acquire a small firm in the United States market in order to obtain a "toehold" in the market. The court considered acquisition of the third largest company with sixteen percent of the market too large to come within the doctrine.[33]

Potential competition was also at issue in the acquisition by Standard Oil Co. of New Jersey (now Exxon) which had large reserves of Canadian potash, of the Potash Co. of America.[34] Of course, Exxon was not a foreign company, but this was a paradoxical situation in which the court looked at a United States company dealing in potash outside the United States, primarily in South America, and considered it as if it were a foreign firm. The court found that Exxon with its Canadian reserves would have probably entered the American market independently had it not acquired Potash Co. of America.

Similarly, in *United States v. Aluminum, Ltd.,*[35] the complaint charged that Aluminum's acquisition (through its American subsidiary, Alcan) of an aluminum fabricating division of National Distillers Co. violated section 7 of the Clayton Act. The case settled by consent decree, calling for the sale of a fabricating plant, was one of a number of cases attacking similar integration acquisitions by United States producing companies, which in the Justice Department's view, threatened the United States aluminum fabricating industry, and so the foreign aspect was not paramount. While essentially vertical in nature, there was an allegation that competition between the United States company, National Distillers, and Aluminum, Ltd. in the sale of aluminum products would be eliminated. The court subsequently relieved the Canadian company from the obligation to sell the plant in question after it found that Aluminum had made a good faith effort to do so without success.

Another vertical case involving the subsidiary of a foreign company was *United States v. Asiatic Petroleum Corp.,*[36] attacking the acquisition by

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[31] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[32] BOC International, Ltd. v. FTC, 557 F.2d 24, 29 (2d. Cir. 1977).

[33] *Id.* at 26 n.3.

[34] United States v. Standard Oil Co., 253 F. Supp. 196 (D.N.J. 1966), [1967] TRADE CAS. (CCH) ¶ 71,895 (consent decree). *Cf.* United States v. Aluminum Co. of America, 377 U.S. 271 (1964).

[35] United States v. Aluminum, Ltd., [1966] TRADE CAS. (CCH) ¶ 71,895 (D.N.J. 1966) (consent decree).

[36] United States v. Asiatic Petroleum Corp., [1971] TRADE CAS. (CCH) ¶ 73,689 (D. Mass. 1971) (consent decree).

Asiatic (one of the Royal-Dutch Shell Group, a fuel oil supplier), of the Sprague Company, a distributor of fuel oil in the New England area. The complaint stated that prior to the acquisition, Asiatic was a major supplier of residual fuel oil to the New England market and that Sprague was the largest deepwater terminal operator in that area. Therefore, the complaint alleged, the acquisition foreclosed fuel oil suppliers from a substantial share of the market and foreclosed fuel oil purchasers from a source of supply. The case was settled by a consent decree providing for divestiture.

The Federal Trade Commission challenged the acquisition by Imperial Chemical Industries, Ltd. (ICI) of Great Britain, one of the world's leading chemical companies, of all of the stock of Atlas Chemical Industries, Inc., a leading United States explosives company.[37] The complaint alleged the elimination of actual competition between the companies in blasting caps and the elimination of potential competition by ICI in the explosives business in the United States and in five submarkets. A consent decree ordered ICI to divest the Explosives and Aerospace Components Division of Atlas, and prohibited it from acquiring any interest in an American explosives business in the United States for ten years without FTC approval.

The Department of Justice has reviewed other foreign company acquisitions where no suit was brought. In connection with the acquisition of International Salt Co. by the Dutch company, KZO, for example, the Department asked the parties to hold up the acquisition pending an investigation. After further consideration, the Department did not oppose the transaction, concluding that KZO, while it was a substantial company in the salt business, was not a likely independent potential entrant into the United States market on its own.[38]

Another transaction involving a foreign company was the proposed interchange of twenty percent minority stock interests by General Cable Corporation (GCC) and British Insulated Callender's Cables, Ltd. (BICC). The GCC stock was owned by American Smelting and Refining Co. whose holdings were subject to an antitrust consent decree. By a court-approved stipulation in that case in June 1970, the government granted permission for the above stock transaction conditioned, *inter alia,* on the requirement that BICC and GCC would not use their less-than-controlling stock interest in one another to fix prices, prevent mutual competition anywhere in the world, or to have an officer, director, or employee sit on each other's board of directors.[39]

The *CIBA* case[40] presented the unusual situation of an antitrust suit in

[37] Imperial Chemical Industries, Ltd., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,914 (FTC 1972) (consent decree).

[38] McLaren, *Antitrust Policy Today,* speech before the National Industrial Conference Board, Inc., held in New York City, on May 5, 1970.

[39] Stipulation entered in United States v. American Smelting & Refining Co., No. 61-241 (S.D.N.Y., June 29, 1970) (final judgment). *See also* U.S. Dep't Justice press release (June 27, 1970).

[40] United States v. CIBA Corp., [1970] TRADE CAS. (CCH) ¶ 73,269 (S.D.N.Y. 1970) (consent decree).

which the Department of Justice joined two foreign (Swiss) companies as defendants in attacking the merger of their American subsidiaries. The complaint charged that CIBA, Ltd. and J. R. Geigy, S.A. were negotiating to merge their worldwide operations. If such an agreement were carried out, the complaint stated, then a corporation would acquire the whole or part of the stock or assets of either CIBA Corp. or Geigy Chemical Corp., their United States subsidiaries, or the stock or assets of either. While this would be a merger from the standpoint of the United States companies, it might be viewed as a joint venture from the standpoint of the Swiss parents. Its actual reorganized corporate structure was not clear at the time of the suit or of the consent decree. The arrangement had the same affect as the more usual situation, that is, a joint venture between two foreign companies resulting in a United States merger. The complaint alleged actual horizontal competition in the United States market between the United States companies in dyestuffs (7.7% and 10.3% market shares respectively), optical brightening agents (10% and 19% of sales to the textile industry), and other products. Aside from their foreign parentage, the only foreign aspect mentioned was that both CIBA and Geigy purchased about sixty percent of their dyestuffs requirements from Toms River, a joint United States producing company, and the balance from their respective Swiss parents or from domestic dyestuffs manufacturers.

The consent decree in the case included a direction that a new company be formed, for sale within three years, to which the American companies would transfer their dyestuffs and their detergent optical-brightening agents businesses.

Where a foreign company has acquired a position in the United States market through exports to the United States, such exports have in cases brought so far, been considered the same as manufacture in the United States, that is, the percentage of the market through such exports has been held equivalent to a domestic market share. This was true in the *Triumph-Adler* case, mentioned above, and this was also asserted in at least two other cases; *United States v. Schenley Industries, Inc.*[41] and *United States v. Insilco Corp.*,[42] both settled by consent decrees. In the first of these cases, the market alleged was entirely an import market—the import of Scotch whiskey. In the *Insilco* case, the acquisition by Insilco Corp., parent of International Silver Co., an American company, of Stanley Roberts, Inc., an American importer, allegedly substantially lessened competition in the sale of stainless steel flatware in the United States market. International was said to have twenty-one percent of the market, and Roberts, through its imports, five percent.

The *1977 Antitrust Guide to International Operations*,[43] published by the

[41] United States v. Schenley Industries, Inc., [1966] TRADE CAS. (CCH) ¶ 71,897 (S.D.N.Y. 1966) (consent decree).

[42] United States v. Insilco Corp., [1974] TRADE CAS. (CCH) ¶ 74,877 (D. Conn. 1974) (consent decree).

[43] ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 15 (1977), *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) NO. 799, at E-1 (1977) and TRADE REG. REP. (CCH) No. 266, pt. II (1977).

United States Department of Justice has one illustration of a transnational merger, with facts somewhat similar to the *Gillette* case mentioned above. The case actually is in contrast to the *Gillette-Braun* case in that in the illustration, the American company acquires a small German specialty manufacturer where there is no suggestion that the German company is engaged in making sales in the United States and the company is not a potential entrant into the United States market.

In the illustration, an American razor blade manufacturer accounting for about half of all United States and world sales proposes to buy a small German specialty manufacturer which has developed a cadmium steel razor blade arguably superior to the traditional steel blades offered by the American company and other major companies here and abroad. It is also said that the German company has been selling these blades in Germany on a low advertising budget and still accounts for less than one percent of all razor blades in Germany. Its export sales to the United States are said to be insignificant and the company has decided against manufacturing such blades in the United States or abroad although it possesses the technical capability to do so. The inquiries to be made by the Department in such a case are: (1) whether the United States market or a relevant part therein is highly concentrated; (2) whether the foreign firm is capable of entering the United States market and is one of a relatively small group of such potential entrants; (3) whether the foreign firm has incentives to enter the United States market; and (4) whether the foreign firm has the capability of entering the market or threatening to enter. Both the *British Oxygen* FTC opinion and the *Schlitz* case which are cited as authority for these tests have been reversed, as noted above, on the basis that a finding of probable "eventual entry" was not a valid test.

In assessing whether or not the foreign company is a "significant potential entrant" into the United States market the Department notes that in the hypothetical case the German company is not an industry leader abroad and has limited size and resources, and that even in its home market it has not engaged in "the extensive product promotion so important to consumer products." Accordingly, the acquisition would not appear to violate section 7.

If the foreign company has a new product, the Department indicates that this could be a factor which might change the conclusion should it be shown that the new product is clearly superior to products now used in the United States. An American patent on such a new product also might be an asset subject to section 7's coverage of the acquisition of assets.

Now what does all of this mean as to when the United States antitrust authorities will bring suits against transnational mergers and when United States courts will invalidate them?

If a foreign company is actually manufacturing in the United States market, or even if it is exporting to the United States market, its sales in that market and percentage of the market through manufacture or imports, will be the primary factor considered by American courts. It would seem that imports should be treated differently since they are subject to being cut off for a variety of reasons, for example, an increase in tariffs or a change in the attractiveness of the American market *vis-à-vis* other foreign markets.

As indicated, in many cases such percentages have been rather low where horizontal competition has been involved. In *United States v. General Dynamics Corp.*,[44] the United States Supreme Court de-emphasized the importance of percentages alone. While saying that under prior cases, the government had made out a *prima facie* case by market share statistics in a merger involving two coal producers, the Court took into account other factors which indicated a lack of an anticompetitive effect, such as, at that time, coal's decline in popularity as a fuel, and the trend of utilities entering into long-term contracts. The question of whether a producer had already tied up its coal reserves also was held to be important.

As indicated, the primary question as to the merger of a United States company and a foreign company not in the market has been that of potential competition. However, the Supreme Court also has drawn back somewhat from the application of this doctrine. In *United States v. Marine Bancorporation, Inc.*,[45] the Court indicated that a precondition of the doctrine would involve evidence that the acquiring company had the feasible means of market entry other than by merger, and that such other entry offers "a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."[46]

Even as stated, however, the doctrine has seemed rather strange to foreign companies. It probably comes as a shock to a foreign company to find that it is considered a potential factor in the United States market merely by virtue of its sales in its own country. The companion idea of a United States foreign merger resulting in entrenchment of a larger or dominant American company in the United States market is probably easier for foreign companies to understand since the emphasis is on the United States market rather than on the foreign company itself. When we reach the situation of an entirely foreign merger with effects in the United States, this is certainly likely to cause repercussions abroad. The *CIBA* case, however, when boiled down to a suit on a merger, in effect, between two American firms is readily understood. The American courts have shown little hesitation in ordering divestiture of acquired stock or assets when a merger has been held illegal. This has been equally true in domestic and transnational mergers, and where a United States company or a foreign company has been the company required to divest. This fact, however, so far has not occasioned particular foreign government protests in section 7 cases.

The British government filed an *amicus curiae* brief in the *British Oxygen* case, when it was before the Second Circuit, but this brief stated that the government did not challenge the jurisdiction of the FTC. The brief did state that if the decision were allowed to stand, "a significant new barrier to the flow of foreign investment between the United Kingdom and the United States will be erected."[47] Attorney General Bell has referred to a merger

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[44] United States v. General Dynamics Corp., 415 U.S. 486 (1974).

[45] United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).

[46] *Id.* at 633.

[47] Amicus Curiae Brief of the Government of the United Kingdom of Great Britain and Northern Ireland (Sept. 1976).

abroad which did affect United States commerce where comity played a large part in the consideration of the United States Department of Justice. The Attorney General stated:

> Sometimes comity causes us to stay our hand. For instance, about two years ago, the Justice Department's Antitrust Division investigated a merger in a foreign country by nations of that country who happened to be among the world's largest producers of an important industrial product.
>
> The firms involved exported most of their production to the United States, and significant assets of the combined firms were located here. Further, while there was no evidence of an explicit conspiracy, the marketing of the product generally followed a pattern of oligopoly pricing.
>
> In short, there was not much question that the United States courts had subject-matter jurisdiction over the merger.[48]

Nevertheless, according to the Attorney General:

> [T]he Antitrust Division concluded that since the merger involved stock acquisitions of foreign companies on a public exchange in the foreign country, and since the merger primarily involved control of assets located in the foreign country, and since the government concerned communicated to us that any attempt by the United States to block the merger would be deemed a serious infringement of a vital national interest, the Justice Department declined to assert U.S. jurisdiction on grounds of comity and foreign policy.[49]

The above instance is quite distinguishable from the *CIBA* case. The products were American imports and there was not a resulting merger in the United States. The Attorney General pointed out the absence of an explicit conspiracy. Still, there would be no conspiracy if simply a merger were involved. This instance of an exercise of comity indicates an awareness on the part of United States antitrust authorities of the foreign reaction which can be caused by an extraterritorial application of the United States antitrust laws. In transnational merger cases, two or more countries may have jurisdiction because a national of each is a party to the merger. With continued dialogue between the United States and Canada, it would seem that United States-Canada merger questions should be resolved without too much difficulty. The present United States transnational merger cases do not appear to have transcended the bounds of comity as of yet.

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[48] United States Attorney General Griffin Bell, speech before the American Bar Association, Chicago, August 8, 1977.

[49] *Id. Cf.* Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), for a new formulation of the test for subject matter jurisdiction.